Christopher J. Pallanch, OSB No. 075864
Direct: 503.802.2104
Email: christopher.pallanch@tonkon.com
Tonkon Torp LLP
888 SW Fifth Ave., Suite 1600
Portland, OR 97204
Facsimile: 503.274.8779

Attorneys for Defendant Nicholas Rupp

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

KILLA BEES DISTRIBUTION LLC, dba KILLA BEEZ, an Oregon limited liability company; KEVIN WONG, an individual,

Plaintiffs,

v.

LEFT COAST FINANCIAL SOLUTIONS, INC., an Oregon corporation; LEFT COAST FS HOLDINGS, INC. dba LCFS, an Oregon corporation; LEFT COAST FS RANCHERIA, INC., an Oregon corporation; CASEY ELIZABETH NYE-HERRINGTON, an individual; DANIEL HERRINGTON, an individual; NICHOLAS RUPP, an individual; DOMINIQUE VILLELA, as an individual and in his capacity as a member, manager, or employee of SHOT VENTURES, LLC; SHOT VENTURES, LLC, an Arizona limited liability company; and DOES 1 through 25,

Defendants.

Civil No. 3:23-cv-01629-JR

DEFENDANT NICHOLAS RUPP'S MOTION TO DISMISS

CONFERRAL CERTIFICATION

Pursuant to LR 7-1(a), the parties conferred telephonically and made a good-faith effort to resolve the issues raised in the present motion but were unable to resolve the dispute.

MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(6), Defendant Nicholas Rupp hereby moves to dismiss Plaintiffs Killa Beez and Kevin Wong's Complaint as to all claims against Mr. Rupp. Plaintiffs fail to plausibly allege facts that state cognizable claims against Mr. Rupp.

MEMORANDUM OF LAW

I. INTRODUCTION

Plaintiff Killa Bees Distribution LLC ("Killa Beez") is a marijuana product distributor based in Oregon. Defendant Left Coast Financial Solutions, Inc. ("LCFS") was a licensed money transmitter in Oregon. This dispute arose after Plaintiffs allegedly placed money with Defendant LCFS, but later were unable to retrieve those funds from either Defendant LCFS or the bank with which LCFS had deposited Plaintiffs' funds.

Plaintiffs now bring suit against LCFS and several other entities and individuals. Included in this group of "other individuals" is Nicholas Rupp, who served as a board member of LCFS. But while Plaintiffs attempt to assert multiple causes of action based on the purported actions or inactions taken by Defendant LCFS, Plaintiffs' complaint omits factual allegations regarding Mr. Rupp as an individual (appropriately so, because Mr. Rupp has never spoken or interacted with Plaintiffs). Because Plaintiffs' Second Amended Complaint fails to allege facts that could state a claim for relief against Mr. Rupp as an individual, he respectfully moves the Court to dismiss this action as to him, for the reasons stated below.

II. STATEMENT OF FACTS

As required on a motion to dismiss, the following facts are set out as alleged in Plaintiffs' Second Amended Complaint (ECF No. 13, the "SAC") and are taken as true for purposes of this motion solely. Reliance upon the Plaintiffs' allegations for purposes of a motion to dismiss is not an admission to any allegation.

According to the SAC, Plaintiffs Killa Beez and Kevin Wong (collectively "Plaintiffs") approached Defendant LCFS and its two principal owners and officers, Defendant Nye-Herrington and Defendant Herrington, in or around February 2022, to engage in "banking" services for Plaintiffs' marijuana business based in Oregon. (SAC ¶¶ 2, 3, 13.) Plaintiffs proceeded to place $126,994.02 with LCFS. (SAC ¶ 13.) In or around September 2022, Plaintiffs informed Defendants Herrington and Nye-Herrington of their intention to make a large withdrawal. (SAC ¶ 14.) On or around November 2, 2022, Plaintiffs requested a check for $30,000.00 from Defendant LCFS, which was provided, but which was returned for insufficient funds when Plaintiffs tried to cash it. (SAC ¶ 15.) Plaintiffs informed Defendants Herrington and Nye-Herrington and requested a reissuance of the check, which was done, but that check bounced as well. (SAC ¶ 16.) On or about November 18, 2022, Plaintiffs contacted Defendants Herrington and Nye-Herrington to discuss the second bounced check. (SAC ¶ 17.) Defendants Herrington and Nye-Herrington informed Plaintiffs that they were no longer with Defendant LCFS. (*Id.*) In or around the same time, Plaintiffs requested that Defendant LCFS issue a check to Eagle Valley Farms, one of Plaintiffs' suppliers, as payment for a purchase. (SAC ¶ at 18.) That check was returned for insufficient funds. (*Id.*) Plaintiffs assert that their funds remain inaccessible. (SAC ¶ 19.)

Plaintiffs' allegations against Mr. Rupp as an individual are thin and vague as to time. Plaintiffs make the conclusory allegation that Mr. Rupp "was, at all material times, an individual residing in the County of Multnomah, State of

Oregon," that he "serv[ed] on the Board of Directors for Defendant Left Coast," and that he was "one of the founders" of LCFS. (SAC ¶ 9.) Plaintiffs then later assert that "Defendant Villela and Defendant Rupp stepped into positions as board members of Defendant Left Coast Financial Solutions to bring it back into compliance with the licensing authorities and return Plaintiff's deposits." (SAC ¶¶ 91, 95.) Nevertheless, Plaintiffs seek to hold Mr. Rupp personally liable in this action.

III. LEGAL STANDARD

This Court set out the legal standard for a motion to dismiss in *Heino v. U.S. Center for Medicare*, 709 F. Supp. 3d 1239, 1247 (D. Or. 2023):

> A motion to dismiss for failure to state a claim may be granted only when there is no cognizable legal theory to support the claim or when the complaint lacks sufficient factual allegations to state a facially plausible claim for relief. *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). In evaluating the sufficiency of a complaint's factual allegations, the court must accept as true all well-pleaded material facts alleged in the complaint and construe them in the light most favorable to the non-moving party. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012); *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). To be entitled to a presumption of truth, allegations in a complaint "may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). The court must draw all reasonable inferences from the factual allegations in favor of the plaintiff. *Newcal Indus. v. Ikon Off. Sol.*, 513 F.3d 1038, 1043 n.2 (9th Cir. 2008). The court need not, however, credit a plaintiff's legal conclusions that are couched as factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).
>
> A complaint must contain sufficient factual allegations to "plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr*, 652 F.3d at 1216. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a

defendant has acted unlawfully." *Mashiri v. Epsten Grinnell & Howell*, 845 F.3d 984, 988 (9th Cir. 2017) (quotation marks omitted).

IV. ARGUMENT

Plaintiffs assert nine causes of actions against Mr. Rupp. Plaintiffs fail to allege facts which plausibly state cognizable claims against Mr. Rupp because Mr. Rupp did not have interactions with Plaintiffs that would give rise to personal liability. Additionally, Mr. Rupp's alleged role as a director of LCFS shields him from individual liability for actions taken in that role. Mr. Rupp's motion to dismiss should be granted.

A. Breach of Contract (First Cause of Action)

Under Oregon law, to state a claim for breach of contract, a plaintiff must allege (1) the existence of a contract; (2) the plaintiff's performance; (3) the defendant's breach; and (4) damages. *Moyer v. Columbia State Bank*, 316 Or. App. 393, 402, 505 P.3d 26 (2021), *rev. den.*, 369 Or. 705, 509, P.3d 116 (2022). Here, Mr. Rupp did not enter into any contract with Plaintiffs, and thus could not have breached any such contract. And as a director, Mr. Rupp has no personal liability for the corporation's breach of contract.

To frame the matter, the Second Amended Complaint is not clear just how Mr. Rupp could have breached a contract with Plaintiffs. Plaintiffs have sued Mr. Rupp as a defendant in his individual capacity, and when describing Mr. Rupp as a party, Plaintiffs asseverate that he "was, at all material times, an individual residing in [Multnomah County] and serving on the Board of Directors for Left Coast." (SAC ¶ 9.) The operative complaint also alleges that Mr. Rupp was "one of the founders of Defendant Left Coast Financial Solutions." (SAC ¶ 9.) But confusing the matter, Plaintiffs purport to lump Mr. Rupp in with "all other Defendants" when the complaint refers collectively to "Defendants Left Coast." (*See* the Introduction to the SAC.) As a result, when Plaintiffs attempt to assert a claim against "Defendants Left Coast," their pleading includes Mr. Rupp (as an

individual) in those claims, even though those claims should be limited to Mr. Rupp only for his alleged involvement as a member of the Board of Directors and as a founder of one of the corporate-entity defendants. In any event, regardless of whether Mr. Rupp is sued as an individual or as a Board member, Plaintiffs' claim fails.

First, the SAC contains no allegations that Mr. Rupp personally entered into any agreement with Plaintiffs where Rupp would receive funds from the Plaintiffs and deposit them anywhere. Stated another way, Mr. Rupp has never had a contract with Plaintiffs, so the first cause of action necessarily fails as to him individually.

Second, Plaintiffs claim against Mr. Rupp as a founder or a board member also fails. To begin with, it is not clear what it means to be, or what legal import arises from being, a "founder" in the complaint. If it means that Mr. Rupp was a "shareholder," the claim would be false in fact (Mr. Rupp was not a shareholder), but it fails in law anyway. Under Oregon law, "a shareholder of a corporation is not liable for the corporation's debts 'merely by reason of being a shareholder.'" *Klokke Corp. v. Classic Exposition, Inc.*, 139 Or. App. 309, 404 (1996) (quoting ORS 60.151(2)). With respect to being a board member, the SAC also fails to allege facts sufficient to demonstrate liability for his role as a director. Directors are not personally liable for the contracts of the corporation for which they serve. *See WSB Investments, LLC v. Pronghorn Dev. Co., LLC*, 269 Or. App. 342, 344 P.3d 548 (2015) (noting the well-established legal principle that "directors, as agents of a corporation, are ordinarily not parties to the contracts of the corporation.") (internal citations omitted); *see also Hirsovescu v. Shangri-La Corp.*, 113 Or. App. 145, 147, 831 P.2d 73 (1992) ("The court erred when it denied the motion for directed verdict on the breach of contract claim. Plaintiff contracted with the corporation, not the individual defendants."); *see also, e.g.*, *Kahn v. Weldin*, 60 Or. App. 365, 376, 653

P.2d 1268 (1982) ("An officer or a corporation who acts within the scope of his authority, discloses his representative capacity to the other party and makes a contract in the corporation's name is not liable for its breach."); *Pelton v. Gold Hill Canal Co.*, 72 Or. 353, 357-58, 142 P. 769 (1914) ("This principle of agency leads to the inevitable conclusion that directors are not liable on contracts made by them on the company's behalf, if their directorship is disclosed to the contractor.") (internal citations omitted). It follows that Plaintiffs' claim against Mr. Rupp for a breach of contract should be dismissed.

B. Breach of Implied Covenant of Good Faith and Fair Dealing (Second Cause of Action)

Similar to the first cause of action, Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing against Mr. Rupp as an individual should be dismissed because Mr. Rupp was not a party to any contract with Plaintiffs, and thus had no implied obligation to them. In general, every contract under Oregon law carries and implied obligation of good faith and fair dealing. *Klamath Off-Water Project water Users, Inc. v. Pacificorp*, 237 Or. App. 434, 445, 240 P.3d 94 (2010). The purpose of the duty is to prohibit improper behavior in the performance and enforcement of contracts, and to ensure that the parties do not engage in any actions that would injure or destroy the rights of the other party to receive the benefits of the contract. *Id.* (internal citations and quotations omitted). The common law implied duty of good faith and fair dealing serves to effectuate the objectively reasonable expectations of the parties. *Id.*

Here, Plaintiffs' second claim for breach of the implied covenant of good faith and fair dealing necessarily fails because Mr. Rupp as an individual was not, and has never been, a party to any underlying contractual relationship alleged in the SAC. Accordingly, Mr. Rupp was not a party to the any contract with Killa Bees, and thus could not have breached any implied obligation of any such contract.

Additionally, the implied duty of good faith and fair dealing may not be used as a vehicle to challenge or insert terms into a contract, for example, by extending liability to a non-party to the contract. *See Brockway v. Allstate Prop. & Cas. Ins. Co.*, 284 Or. App. 83, 95-96, 391 P.3d 871 (2017) (an implied duty of good faith and fair dealing cannot be construed in a way that changes or inserts terms into a contract) (internal citations omitted). Plaintiffs' second cause of action fails as to Mr. Rupp.

C. Unjust Enrichment (Third Cause of Action)

Plaintiffs' claim for unjust enrichment against Mr. Rupp should be dismissed because Mr. Rupp gained nothing from the transactions described in the complaint. The "well-established" elements for an unjust enrichment claim are (1) a benefit conferred on the defendant by the plaintiff; (2) the defendant's awareness of the benefit; and (3) under the circumstances, it would be unjust for the defendant to retain the benefit without compensating the plaintiff. *Grimstad v. Knudsen*, 283 Or. App. 28, 42, 386 P.3d 649 (2016) (quoting *Winters v. County of Clatsop*, 210 Or. App. 417, 421, 150 P.3d 1104 (2007)). Here, Plaintiffs allege that "Defendants Left Coast" (presumably inclusive of Mr. Rupp as an individual), "gained and continue to gain financial benefits" from Plaintiff's deposits (SAC ¶ 36). Yet the SAC contains no allegation plausibly showing that Mr. Rupp (in any capacity) obtained any personal benefit from Plaintiffs. Account "deposits" held in an account of a third party did not confer any benefit on Mr. Rupp as an individual. Thus, Plaintiffs' third claim fails.

D. Negligence (Fourth Cause of Action)

Plaintiffs' negligence claim against Mr. Rupp is barred by the economic loss doctrine. Under Oregon common law, a person whose negligent conduct unreasonably creates a foreseeable risk of harm to others and causes injury to another may be liable in damages for that injury. *Harris v. Suniga*, 344 Or. 301,

307, 180 P.3d 12 (2008). Nevertheless, an exception to that general rule arises in claims for economic losses, as opposed to claims for damages for injury to person or property. *Id.* This exception is known as the economic loss doctrine, which serves to bar a party that has suffered a purely economic loss from bringing a negligence action against the party that allegedly caused the loss, unless there is a special relationship between the parties. *Id.* at 305. Generally, "special relationships are formed when 'one party has authorized the other to exercise independent judgment in his or her behalf.'" *Gibson v. Bankofier*, 275 Or. App. 257, 276, 365 P.3d 568 (2015) (quoting *Conway v. Pacific Univ.*, 324 Or. 231, 241, 924 P.2d 818 (1996)).

Because Plaintiffs' negligence claim seeks only economic losses, it is subject to the economic loss rule. Plaintiffs do not, however, allege facts that plausibly establish a "special relationship" between them and Mr. Rupp (whether as a director of LCFS or as an individual).

As to Mr. Rupp as a director of LCFS, nothing in the SAC serves to foist personal liability upon Mr. Rupp for actions of the corporation.[1] Nor does it appear that Plaintiffs could assert a negligence claim against LCFS, even if one accepted Plaintiffs' characterization of the parties' relationship. A relationship between a "depositor" and an entity that allegedly held those deposits is not a special relationship. LCFS was simply not authorized by Plaintiffs to do anything with the money other than hold it; accordingly, no special relationship existed as alleged in the SAC and Plaintiffs' claim fails. *See Stevens v. First Interstate Bank of California*, 167 Or App 280, 287-88, 999 P.2d 551 (2000) ("The relationship between plaintiffs, as depositors, and their bank was not of the sort that Oregon courts have found gives rise to the requisite distinct 'legally protected interest'" to assert a

[1] *See also* Section IV(A), (B), and accompanying analysis regarding a director's non-liability for a corporation's alleged breach of contract.

negligence-based claim); *see also Transamercia Ins. Co. v. U.S. Nat'l Bank*, 276 Or. 945, 956, n. 11, 558 P.2d 328 (1976) ("A bank deposit creates a debtor-creditor relationship; the incidents of that relationship are provided by law (although they may, within limits, be varied by agreement) (internal citations omitted in original)); *Dahl & Penne, Inc. v. State Bank of Portland*, 110 Or. 68, 72, 222 P. 1090 (1924) (stating that the relationship between a "banker and customer, in respect to deposits, is that of debtor and creditor," and that the "contract between the parties is purely legal and has no element of a trust in it.") (citations omitted)). Accordingly, the fourth cause of action should be dismissed against Mr. Rupp in his capacity as a director.

Similarly, as to Mr. Rupp individually, there is simply nothing in the SAC alleging any special relationship between Plaintiffs and Mr. Rupp, and thus Plaintiffs' claim fails. In sum, Plaintiffs' negligence claim is barred by the economic loss doctrine and should be dismissed because Plaintiffs seek economic damages, but there are no facts alleged showing a special relationship between the parties.

E. Fraudulent Misrepresentation (Fifth Cause of Action)

Plaintiffs' fraud claim as to Mr. Rupp should be dismissed. Pursuant to FRCP 9(b), plaintiffs alleging fraud or mistake must state with particularity the circumstances constituting fraud or mistake. *Unigestion Holding, S.A. v. UMP Technology, Inc.*, 160 F. Supp. 3d 1214, 1220 (D. Or. 2016). Accordingly, "[t]o state a claim under this standard, a plaintiff 'must identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false.'" *Id.* (quoting *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2001)); *see also Unigestion Holding, S.A.*, 160 F. Supp. 3d at 1220 ("The Plaintiff's allegations must provide 'notice of the particular misconduct which is alleged to constitute the fraud charged,' in enough detail to permit the defendant to 'defend against the charge and

not just deny that [it has] done anything wrong.'") (quoting *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 999 (9th Cir. 2010)). Specifically, the complaint must specify the facts such as the times, dates, places, benefits received, and other details of the alleged fraudulent activity. "FRCP 9(b) 'does not allow a complainant to…lump multiple defendants together but require[s] plaintiffs to differentiate their allegations when suing more than one defendant.'" *Destfino v. Reisweig*, 630 F.3d 952, 958 (9th Cir. 2011) (internal citations omitted).

Here, Plaintiffs' SAC fails to comport with the requirements of FRCP 9(b) and therefore fails to state a claim against Mr. Rupp. The SAC asserts legal conclusions, none of which are attributed to any defendant in particular, and certainly not to Mr. Rupp individually. Failure to comport with FRCP 9(b)'s heightened pleading standard requires dismissal of this claim.

F. Dishonored Check (Sixth Cause of Action)

Plaintiffs next bring a "dishonored check" cause of action, seeking to recover for three separate bounced checks. Under ORS 30.701, "[i]n any action against a maker of a dishonored check, a payee may recover from the maker statutory damages . . . or triple the amount for which the check is drawn, whichever is greater." Plaintiffs' sixth claim of Dishonored Check under ORS 30.701 is insufficient as to Mr. Rupp individually for any one of several reasons.

Mr. Rupp was not a "maker" of any dishonored check. A "maker" of a check is defined as "a person who signs or is identified in a note as a person undertaking to pay." ORS 73.0101(1)(d). The SAC alleges that "Defendants" issued a check for $30,000.00 to Plaintiffs on November 2, 2022. (SAC ¶¶ 16, 59(a)), and that after that check was returned, "Defendant Herrington and Defendant Nye-Herrington reissued the same check" the following day. (SAC ¶¶ 16, 59(b)). Neither allegation for either of these two checks suggests that Mr. Rupp was the "maker" of either check. To the contrary, the SAC subsequently forecloses a factual universe where

Mr. Rupp could be the "maker" of these two checks because he returned to LCFS *after* the checks were issued to try to bring Defendant LCFS into compliance with certain regulations. (SAC ¶ 91.)

With respect to Plaintiffs' third check, Plaintiffs' claim fails as to Mr. Rupp for the reasons noted above as well as a separate, independent reason. Plaintiffs allege that they "requested Defendants issue a check to one of Killa Beez's suppliers" Eagle Valley Farm, in the amount of $22,689.00 on or about November 18, 2022. (SAC ¶¶ 18, 59(c)). Again, these allegations fail to state a claim against Mr. Rupp because there is nothing to suggest that he was the maker of the check. Additionally, the allegations as to this check are self-defeating because, under ORS 30.701, only the "payee" of a dishonored check has a cause of action against the "maker." Eagle Valley Farm, rather than Plaintiffs, was the payee. Therefore, because there are no facts to support the claim that Mr. Rupp as an individual was the maker of any of the three checks, and because the Plaintiffs are not the payee as to the third check, all of Plaintiffs' dishonored check claims should be dismissed as to Mr. Rupp.

G. Conversion (Seventh Cause of Action)

Under Oregon law, conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel. *Morrow v. First Interstate Bank of Oregon, N.A.*, 118 Or. App. 164, 171, 847 P.2d 411 (1993) (internal citations and quotations omitted).

Here, Plaintiffs' SAC lacks any allegation that Mr. Rupp, as an individual, exercised any dominion or control over Plaintiffs property. Indeed, the SAC appears to assert that Mr. Rupp, to the extent that he was a director of LCFS, arrived in that role in an attempt to undo any prior alleged conversion by Defendants Herrington and Nye-Herrington. (SAC ¶ 95.)

H. RICO (Eighth Cause of Action)

As an initial matter, both the plausibility requirement of FRCP 8(a) and the particularity requirement of FRCP 9(b) apply to allegations of fraud. *Unigestion Holding, S.A.*, 160 F. Supp. 3d at 1220 (internal citation omitted). The heightened pleading standard of FRCP 9(b) also applies to RICO claims alleging predicate acts involving fraud. *Id.* Accordingly, Plaintiffs' RICO claim fails for the reasons stated *supra*, Section IV(E).

Beyond Plaintiffs' pleading defects, the substance of Plaintiffs' RICO claim fails because Plaintiffs' allegations do not establish a violation of the RICO statute. The Racketeer Influenced and Corrupt Organizations Act allows for civil recovery for any person injured by a prohibited activity under the statute. 18 U.S.C. §§ 1964, 1962. Each prohibited activity is defined in 18 U.S.C. § 1962 to include as a necessary element proof of either "a pattern of racketeering activity" or of "collection of an unlawful debt." *H.J. Inc. v. Nw. Bell Tele. Co.*, 492 U.S. 229, 232, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989). Racketeering activity includes certain federal and state felonies. 18 U.S.C. § 1961(1). A "pattern of racketeering activity" requires a minimum of two acts of racketeering activity. 18 U.S.C. § 1961(5). To prove a pattern of racketeering activity a plaintiff must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity. *H.J. Inc.* 429 U.S. at 239. Continued criminal activity is both a closed- and open-ended concept. *Id.* at 241. Closed-ended continuity is established by showing that related predicate acts occurred over a substantial period of time, but there is no threat of future criminal conduct. *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1527, 65 F.3d 1523 (1995); *H.J. Inc.* 429 U.S. at 241. Open-ended continuity is the threat that criminal conduct will continue in the future. *Allwaste*, 65 F.3d at 1527. It is established by showing either that the predicate acts include a specific

threat of repetition extending indefinitely into the future or that the predicate acts were part of an ongoing entity's regular way of doing business. *Id.*

Here, Plaintiffs' RICO claims fail as to Mr. Rupp as an individual because the SAC not only contains no allegations or indications that Mr. Rupp's conduct was prohibited by the RICO statute, it is completely devoid of any allegations regarding Mr. Rupp's individual conduct or actions. The failure to allege specific actions by Mr. Rupp, or to differentiate between the actions of any of the named defendants is also fatal of its own accord. *See Destfino*, 630 F.3d at 958 (noting that FRCP 9(b) "does not allow a complaint to . . . lump multiple defendants together" but requires "plaintiffs to differentiate their allegations when suing more than one defendant") (internal citations omitted).

Moreover, Plaintiffs' allegations in the SAC fail to allege a plausible pattern of racketeering activity. While the SAC asserts that Defendants LCFS's "pattern of racketeering activity," was "soliciting funds from Plaintiffs in an ongoing manner over the first (10) months of 2022, while knowing that it would not issue 'withdrawals,'" (SAC ¶ 70), this does not bring the SAC to the realm of "plausibility" that is required. It is equally plausible that Defendants obtained Plaintiffs' money properly, and it was only the intervening actions of other third-parties (such as the depositor bank (City Trust Bank) holding on to the funds) that prevented Plaintiffs from withdrawing their deposited money. Stated another way, Plaintiffs' RICO claim fails as an independent matter because Plaintiffs have only presented factual allegations constituting a "sheer possibility that a defendant has acted unlawfully." *Mashiri*, 984 F.3d at 988. In all events, there are no allegations that Mr. Rupp himself could or should be personally liable for a RICO violation.

I. Breach of Fiduciary Duties

Plaintiffs' ninth cause of action asserts six counts of breaches of fiduciary duties. The six counts involve three types of breaches of fiduciary duties: (1) the

duty of good care; (2) the duty of loyalty; and (3) the duty of good faith. All six counts fail because Mr. Rupp, as a director of LCFS, owed no fiduciary duties to the Plaintiffs.

As an initial matter, "[m]ajority or other *controlling shareholders* owe fiduciary duties of loyalty, good faith, fair dealing, and full disclosure *to the minority*." *Naito v. Naito*, 178 Or. App. 1, 20, 35 P.3d 1068 (2001) (emphasis added; internal citation omitted). "*Directors* owe similar duties *to the corporation*." *Id.* (emphasis added). That is, directors owe their corporation a "duty of loyalty, good faith, fair dealing and full disclosure." *Chiles v. Robertson*, 94 Or App 604, 619, 767 P.2d 903 (1989). When a director, officer or majority shareholder takes action for his or her own benefit at the expense of the corporation or other shareholders, the action constitutes a breach of fiduciary duty. *Noakes v. Schoenborn*, 116 Or. App. 464, 472, 841 P.2d 682 (1992).

Here, Plaintiffs are neither the company LCFS nor shareholders in LCFS, and thus Mr. Rupp owed them no fiduciary duties. Were it otherwise, then every officer, director, or shareholder of a company would face individual liability for any routine company breach of contract case, which would destroy the protection of limited liability entities.

Additionally, the allegations against Mr. Rupp are insufficient to state a claim for relief. While some (but not all) of the counts assert that the defendants collectively used "invested funds for their own personal gain," (e.g., SAC ¶ 84, 88, 96, 100), these allegations are implausible (in that Mr. Rupp certainly did not use any company assets for personal gain) and inconsistent. For example, the Second Amended Complaint asserts that Mr. Rupp "stepped into [his] position[] as [a] board member[] of Defendant Left Coast Financial Solutions to bring it back into compliance with the licensing authorities and return Plaintiffs' deposits." (SAC ¶ 91.) Temporally, this means that Mr. Rupp arrived on the scene *after* Plaintiffs'

funds were frozen by City Trust Bank, and, despite Mr. Rupp's efforts, could not get City Trust Bank to return Plaintiffs' money. Far from showing a breach of duty (which was not owed to Plaintiffs in any event), the allegations demonstrate that Mr. Rupp tried to repair whatever harm it was that Plaintiffs purportedly suffered.

Plaintiffs have failed to plead facts sufficient to state a claim for relief as to Mr. Rupp.

V. CONCLUSION

For the reasons stated above, Mr. Rupp respectfully requests that this Court dismiss Plaintiffs' Second Amended Complaint in its entirety as to Mr. Rupp.

DATED: October 15, 2024.

TONKON TORP LLP

By: */s/ Christopher J. Pallanch*

Christopher J. Pallanch, OSB No. 075864
Direct: 503.802.2104
Email: christopher.pallanch@tonkon.com

Attorneys for Defendant Nicholas Rupp